Petition

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81-197

No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

APPALACHIAN POWER COMPANY,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

GUY FARMER
Counsel of Record
JOHN A. McGUINN
FARMER, WELLS, McGUINN, FLOOD, SIBAL & BECHTEL
1000 Potomac Street, N.W.
Washington, D.C. 20007

FREDRIC L. SAGAN
Senior Labor Counsel
American Electric Power Service Corporation
180 East Broad Street
Columbus, Ohio 43215

Attorneys for Appalachian Power Company

Washington, D.C. • THIEL PRESS • (202) 638-4621

QUESTIONS PRESENTED

1. Is it an unfair labor practice for an employer to discontinue in a particular unit a grievance-arbitration procedure established exclusively for use by unrepresented employees of the employer in circumstances where:

   a. A Union is certified as the exclusive bargaining representative of the employees in the unit involved, and

   b. The grievance-arbitration procedure provides for no Union participation and is incompatible with Union representation and Union rights of participation under Section 9(a) of the Act, and

   c. The employer agreed to negotiate an interim procedure as a substitute for the withdrawn procedure, but the Union declined, and

   d. The employer and the Union subsequently negotiated and put into effect as a part of an overall labor agreement a complete grievance-arbitration procedure which provided for Union participation at all steps.

2. Is it an unfair labor practice to discontinue a 5-minute wash-up period for a few employees in one department where such special dispensation had been granted to a very few employees by two low-level supervisors contrary to Company policy and without Company knowledge and where no discriminatory intent was found.[1]

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[1]We will not argue this issue in this petition since, while the finding is obviously incorrect, it would not, standing alone, be worthy of a petition for a writ. But, if the Court grants the writ on the major issue, we believe that this issue is sufficiently impor-

[footnote continued]

PARTIES TO THE PROCEEDINGS

The Parties listed in the caption above are the same as those in the court below. The petitioner Appalachian Power Company is a wholly owned subsidiary of American Electric Power Corporation. Franklin Real Estate is an affiliate of Appalachian Power Company.

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tant to also be heard. The Law Judge recommended that this allegation also be dismissed. If the petition is granted we would wish to include this issue in our presentation to the Court on the merits.

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IN THE

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OCTOBER TERM, 1981

APPALACHIAN POWER COMPANY,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The petitioner Appalachian Power Company respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on April 8, 1981.

I.

OPINIONS BELOW

The opinion of the Court of Appeals appears in the Appendix hereto at pp. 1a-4a. The Court's denial of the petitioner's motion for rehearing appears in the Appendix hereto at pp. 5a-6a. The decision and order of the National Labor Relations Board, enforced by the Court of Appeals, is reported at 250 NLRB No. 38, and appears in the Appendix hereto at pp. 7a-19a. The decision of the Administrative Law Judge in this case appears in the Appendix at pp. 20a-50a.

II.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on April 8, 1981. The petition for rehearing was denied on May 18, 1981, and this petition for certiorari is being filed within 90 days of the latter date. This Court's jurisdiction is being invoked under 28 U.S.C. § 1254(1).

III.

STATUTORY PROVISIONS INVOLVED

United States Code, Title 29:

Section 158

(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

* * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

Section 159

(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions

of employment: *Provided,* That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective bargaining contract or agreement then in effect: *Provided further,* That the bargaining representative has been given opportunity to be present at such adjustment.

IV.

STATEMENT OF THE CASE

This case involves a decision by the Board, enforced by the Court of Appeals, ordering the employer upon request by the Union, to reinstate for unit employees, a grievance-arbitration procedure which was designed exclusively for unrepresented employees and excluded any Union participation. The employer, in accord with its uniform practice, had discontinued the non-Union procedure for the Union-represented employees after the Union was certified as the exclusive bargaining agent in a production and maintenance bargaining unit at the employer's Amos power plant. The employer thereafter negotiated with the Union both an interim grievance procedure pending negotiation of a complete labor agreement, and, as a part of the contract negotiations, agreed to a permanent grievance-arbitration procedure for Union employees.

The grievance-arbitration procedure for unrepresented employees was in place at the Amos plant long before the Union was certified on May 20, 1977. When the Union was certified, as it had routinely done in like circumstances at other plants, the Company advised

the unit employees at the Amos plant on May 24, 1977 that the employees "now represented by the United Steelworkers will no longer be covered. . . ."

The letter went on to say:

> When Appalachian Power and the Union sit down to negotiate, it is presumed that a grievance-arbitrattion procedure will be one of the matters discussed.
>
> Meanwhile, though the formal grievance-arbitration procedure no longer applies to you, all members of management continue to be available to discuss any questions you have concerning your work.

Appendix, p. 51a.

The Law Judge found that in subsequent discussions the employer offered to agree to an "interim procedure" to fill in the gap while a Union procedure was being negotiated, but the Union showed no interest. Nevertheless, at the employer's initiative, an interim grievance procedure was agreed to and followed. Eventually, both parties proposed permanent grievance-arbitration procedures, and a mutually agreed-upon procedure providing for full Union participation was inserted in the collective bargaining agreement, effective May 10, 1979. This agreement was to continue for two years, and was renewed on May 1, 1981 for a three-year period. This latter contract also contained a grievance-arbitration provision. Thus, the Union-employer negotiated procedure has been in effect and followed by both parties since the first contract became effective on May 10, 1979.

Based on charges filed by the Union, the General Counsel issued a consolidated complaint on June 9, 1978, contending that the Company's action in discontinuing the non-Union procedure upon certification of the

Union was an unlawful unilateral act under Sections 8(a)(5) and (1) of the Act. The complaint further alleged that the Company was engaged in surface bargaining in overall bad faith.

The Administrative Law Judge, in his decision issued on September 28, 1979, exonerated the Company of all unfair labor practices alleged in the complaint. He found that the Company engaged in good faith bargaining throughout on all issues and recommended dismissal of the entire complaint.[2]

On the issue of the grievance-arbitration procedure established for unrepresented employees, the Law Judge found that its continuance after Union certification would be inconsistent and incompatible with Union representation. As he stated,

> [T]o begin with, it is obvious to the undersigned that the grievance procedure as written was not compatible with union representation. The obvious deficiency is that it does not provide for union participation which is an immediate right, when the union is certified as the bargaining agent for the individuals involved.

The Law Judge further found that the Union's position was that the "grievance procedure must remain exactly as written in the 'Green Book'[3] without even explaining any differences as to Union representation." He also found that the Company offered to negotiate

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[2]On the issue of the 5-minute wash-up time, the Law Judge found the allegation trivial and unfounded, and recommended it be dismissed. Appendix, p. 49a.

[3]The "Green Book" reference is to an employee manual which predated the advent of the Union and which was discontinued in 1979 because it was obsolete. That discontinuance was not made an issue by the Complaint.

changes to make the procedure compatible with Union representation, but the Union showed no interest. He concluded that the Union was itself acting in bad faith and was using this issue as a "bargaining ploy" to attempt to convert an economic strike into an unfair labor practice strike. *See* Appendix, pp. 31a-32a.

The Board, in its decision issued June 27, 1980, accepted the Law Judge's recommendation to dismiss the allegation of bad faith bargaining and also agreed that the strike was economic and not an unfair labor practice strike.

Nevertheless, the Board, inexplicably, reversed the Law Judge on the issue of the grievance-arbitration procedure.[4] The Board found that the employer unilaterally discontinued the procedure and thus violated the Act. The Board pointedly ignored the Law Judge's analysis and substituted none of its own. The Board did not even so much as consider or discuss the crucial finding of the Law Judge that the grievance-arbitration procedure in question was "incompatible" with Union representation, although this was the central issue in the case.

The Board's sole rationale was:

> Thus, we have here a situation where Respondent unilaterally changed a term and condition of employment at a time when it was required to bargain with the Union about such matters. Such change was not justified by the language of the grievance-

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[4]The Board also overruled the Law Judge on the five-minute wash-up time for a few maintenance employees, although, as the Law Judge found, the allowance of the wash-up time to a few employees by low level supervisors was contrary to Company policy and that there was no discriminatory intent.

> arbitration procedure which excluded represented employees from its coverage.

Appendix, p. 12a.

This finding is patently inexplicable. The grievance-arbitration procedure was not a condition of employment for Union employees. The Board did not explain (1) why the employer was required to bargain about a "term or condition of employment" which was inapplicable to union-represented employees, and (2) which was incompatible with union representation. The Board cited two cases as authority for its sweeping conclusion. These cases are *Goodyear Tire & Rubber Company*, 170 NLRB 539 (1968), and *The Kroger Company*, 164 NLRB 362 (1967). Both cases involved benefit plans which were held to be discriminatory under Section 8(a)(3) of the Act, and are totally inapposite since the issues in this case are entirely different and no Section 8(a)(3) violations are involved in this case. Moreover, the Board decision in the *Goodyear* case was denied enforcement by the 6th Circuit in *Goodyear v. NLRB*, 401 F.2d 682 (6th Cir. 1968).

The employer appealed the Board decision to the Fourth Circuit Court of Appeals. The grievance-arbitration issue was thoroughly briefed and argued before a three Judge panel in the 4th Circuit.

The Court's response was to issue a three-page *per curiam* opinion ordering the employer to reinstate upon request by the Union the non-union grievance procedure for the union-represented employees in the certified bargaining unit at the Amos plant of the employer.

The court below did not question the employer's good faith. The court disposed of the critical issue of incompatibility of a non-union procedure with Union representation by the mere assertion that:

> There is no merit to this contention and Appalachian's good faith in advancing it does not save the Company's position. [App. p. 3a.]

The court below did not give any recognition to the fact that the Board did not even rule on the issue of incompatibility. Nor did the court even so much as refer to the Law Judge's careful analysis and contrary conclusion on this controlling issue.

The court below did not attempt to rationalize the Board's holding that an employer must bargain with a Union over a "term and condition of employment" applicable only to "non-represented" employees. The basic premise of the Act is that the duty to bargain is a duty to bargain on behalf of unit employees only. The Board's and the lower court's concept that there is a duty to bargain with a union on a plan or procedure designed exclusively for unrepresented employees is unprecedented and erroneous as a matter of law.

Thus, based on the lower court's enforcement of the Board's order to reinstate upon request the non-union procedure for union employees, the employer is faced with an insoluble dilemma. Compliance with that order would require the employer to reinstate the non-union procedure in which the Union would have no participation, while at the same time the employer must, under Section 301 of the Taft-Hartley Act,[5] honor the entirely different grievance-arbitration procedure contained in the current collective bargaining agreement. The em-

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[5]Section 301 (29 U.S.C. § 185) states in pertinent part: "(a) Suit for violation of contract between an employer and a labor organization . . . may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

ployer is unable to comprehend how these two totally incompatible procedures, presumably applicable to the same grievances, can coexist as methods for resolving the same grievances for members of the same employee unit.

Faced with this impossible situation, the employer, on April 21, 1981, filed with the Court of Appeals a Petition for Rehearing with a Suggestion for Rehearing *En Banc.*

The Petition for Rehearing and Suggestion for Rehearing *En Banc* was summarily denied on May 18, 1981, and again denied in an amended order on June 4, 1981, by the same three-Judge panel that issued the original decision. Appendix, pp. 5a-6a.

The employer filed on June 1, 1981, with the lower court, a Petition for Clarification of the court's decision and order. This petition basically asked the court how the employer could honor its negotiated contractual grievance-arbitration procedure and at the same time reinstate a totally different procedure for handling grievances and arbitrating disputes for members of the same employee unit. The point was also made that the non-union procedure provided for resolution of disputes involving the interpretation or application of a non-existent and obsolete employee manual, which was superseded by the two negotiated collective bargaining agreements. Because its point of reference was the discontinued manual, reinstatement of the non-union procedure would not allow for arbitration of grievances arising under the current collective bargaining agreement. This would produce an incongrous and absurd result. The labor agreement provides for the arbitrating of grievances involving the application and interpretation of the agreement. The old non-union procedure provided for arbitration of the application and interpretation

of the now non-existent and obsolete manual. The old procedure further provided that in considering grievances, the "neutral arbitrator shall not add to, or detract from, or modify any part of this Plant Employee Manual." *See* Appendix, p. 54a. The petition is set forth in the Appendix at pp. 55a-59a. On June 23, 1981, the Court of Appeals denied the petition for clarification. Appendix, p. 60a.

On May 13, 1981, the Union wrote a letter to the employer requesting reinstatement of the non-Union grievance arbitration procedure, but making no reference to its intent as to the negotiated grievance-arbitration procedure contained in the current collective bargaining agreement. The negotiated procedure is attached hereto at Appendix, pp. 61a-65a. It is noteworthy that this contractual procedure for resolving grievances was agreed upon *after* the Union knew that the Court of Appeals had enforced the Board's Order requiring reinstatement, upon request by the Union, of the non-union grievance-arbitration procedure. Thus, it is completely unclear as to what procedure the Union has "elected" to pursue. *See* letter, Appendix, p. 66a.

V.

REASONS FOR GRANTING THE WRIT

A.

The Decision Below Raises Important and Recurring Problems Concerning the Obligation of an Employer to Maintain Contemporaneously Two Entirely Different Grievance-Arbitration Procedures, One of Which Is Compatible with, and the Other Incompatible with, Union Representation

The issue raised in this case is whether an employer who provides a grievance resolution procedure for unrepresented employees must continue this same procedure after a Union has been certified for a unit of employees, even where the Union and employer have later negotiated a wholly different contractual grievance-arbitration procedure which is compatible with Union representation.

Appalachian Power Company is one of eight operating electric utility companies that are a part of the American Electric Power system. For many years, the A.E.P. system has maintained a procedure for allowing unrepresented employees to bring grievances and have them considered by management up to the top level, and to arbitrate if no resolution is reached. As a part of this procedure, the Company has agreed to pay the costs of arbitration, including providing the unrepresented employee a lawyer of his or her own choosing at the employer's expense to represent him or her in the arbitration. Research through labor publications has revealed that a substantial number of other major employers have adopted procedures for resolving employee complaints for unrepresented employees, many of them

through formal grievance and/or grievance-arbitration procedures.[6] The holding of the court below that unions can demand, without bargaining, the use of the same procedures for union-represented employees can only serve to discourage the use of these procedures which are of great value to the non-union employees.

Throughout history, the operating companies of the A.E.P. system have routinely and without objection discontinued these procedures for employees who select a union to represent them. When a union is certified for an employee unit, the employer has discontinued the grievance-arbitration procedure for the employees in the newly-certified unit and negotiated a union grievance-arbitration procedure for them. Until this case arose, this policy has never been questioned. Indeed, continuance of the non-union procedure, which does not allow for union participation at any stage, after union certification, would in all likelihood violate the Act by denying the Union its representational rights.[7]

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[6] For example, Amax Corporation has a formal grievance-arbitration procedure for non-union employees, as does Northrup Aviation and many others. A 1979 Bureau of National Affairs Report shows 44 per cent of those corporations sampled had formal grievance procedures for non-union employees. *See*, Policies for Unorganized Employees, PPF Survey No. 125, April 1979, the Bureau of National Affairs, Inc., Washington, D.C. 20037. Table 4 of that report, which illustrates the extent of such formal procedures in the non-union sector, is reproduced at Appendix, p. 67a.

[7] For example, Section 9(a) of the Act guarantees the Union the right to be present and participate at all steps of the grievance procedure. *See* 29 U.S.C. § 159(a), reprinted at pp. 2-3 *supra*. The discontinued procedure was designed exclusively for nonrepresented employees and therefore obviously excluded any union participation at any step.

If the Board's decision, enforced by the Court of Appeals, is allowed to stand, the status and legality of these grievance-arbitration plans for unrepresented employees will be placed under a cloud. Any employer with such a plan would be placed in a classic "Catch 22" situation, where continuance or discontinuance of the plan could involve the employer in a violation of the Act.

Clarification of the legal status of these plans alone is more than sufficient reason for review by the Court.

One aspect of the case not discussed by the Board or the Court of Appeals is significant. The non-Union procedure in question was established for unrepresented employees and does not provide for any Union participation at any step. One may wonder, therefore, why the Union would be so adamant in demanding its reinstatement, especially since the Union has negotiated a contract procedure which is a typical Union procedure providing for full union representation of the grievant through all steps of the grievance procedure and through arbitration. Why would a union want a grievance-arbitration procedure in which it has no participation?

That question has not been answered. However, one may speculate, with some foundation in logic, that the giant Steelworkers Union sees here an opportunity to force the employer to pay all costs of arbitration, including attorney fees to Steelworkers lawyers to represent Steelworker member grievances. Public policy should forbid this tactic, and, in addition, such payments would violate Section 302 of the Act as a prohibited payment to a union representative.[8] The result would

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[8] *See* Subsections (a) and (b) of Section 302 (29 U.S.C. § 186) which prohibits the payment of money or delivery of anything of value to any labor organization, its representatives or agents.

be that the Union would have a positive incentive to foment grievances and take them to arbitration without regard to their merit, having placed the entire cost of arbitration on the employer.

B.

The Decision Below Conflicts Gravely with the Ruling of the Court in *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474 (1951).

Universal Camera is one of the landmark cases instructing the courts of appeals in their responsibilities in reviewing Board decisions. The decision of the Court of Appeals in this case seriously transgresses that court's proper role in the administration of the Act and specifically in reviewing Board decisions.

We respectfully submit that the court below went far astray when it adopted the inadequate and ambiguous conclusions of the Board, while at the same time totally ignoring the contrary findings of the Law Judge, especially when they were so explicit and well-reasoned.

The Law Judge found, and explained why, the non-union procedure was "incompatible" with union representation and why the employer was not required or even permitted to continue it after the Union was certified. The Board did not address this issue at all. The court below concludes without any rationalization that the non-union procedure was not "incompatible" with union representation. But, as the Law Judge found, the procedure for unrepresented employees is "obviously" incompatible with exclusive union representation because it does not provide for any union participation in the grievance-arbitration process. He also found that the Union did not request any changes

to allow it to participate in the procedure, but demanded that the non-union procedure be reinstated without change and "exactly as written". Appendix, pp. 31a-32a. No self-respecting union would think of adopting a grievance-arbitration procedure in which it had no part to play whatsoever.

All this led the Law Judge to conclude that the Union position on the issue was a mere "bargaining ploy" and not a serious proposition. Appendix, p. 32a.

The failure of the court below to weigh these findings by the Law Judge does violence to the rule enunciated in *Universal Camera*. There, Judge Frankfurter, speaking for the Court, stated that: "The plain language of the statute directs a reviewing Court to determine the substantiality of the evidence on the record including the examiner's [now Law Judge's] report." 340 U.S. at 493. The decision in *Universal Camera* also made it plain that the reviewing court must consider the record as a whole and not merely rely on selected portions of the record that may tend to support the Board's decision. Parenthetically, there are *no* portions of the record that support the Board's decision in this case.

Finally, the court in *Universal Camera*, admonished the appellate courts that they must accord the findings of the trial examiner (now Law Judge) "the relevance that they reasonably command in answering the comprehensive question whether the evidence supporting the Board's order is substantial." 340 U.S. at 497.

The lower court's *per curiam* opinion does not meet these basic standards. It does not weigh or even refer to the findings and conclusions of the Law Judge. It merely adopts, without any meaningful rationale, the conclusionary and contrary findings of the Board. Thus,

the court acted as a mere rubber stamp to the Board's decision. It never addressed itself to the controlling issue or to the findings and analysis of the Law Judge which were ignored by the Board. Specifically, the court below did not address the Law Judge's critical and controlling finding of the incompatibility of the non-union procedure with Union representation. Nor did the Board. The court itself was unable to supply this essential missing element.

The *Universal Camera* rule of law spelling out the role and responsibility of the reviewing courts is basic to the administration of the Act. *Universal Camera* was both ignored and transgressed by the court in this case.

VI.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that a writ of certiorari should issue to the Fourth Circuit in this case.

Respectfully submitted,

GUY FARMER
Counsel of Record

JOHN A. MCGUINN

FARMER, WELLS, McGUINN,
FLOOD, SIBAL & BECHTEL
1000 Potomac Street, N.W.
Washington, D.C. 20007

FREDRIC L. SAGAN

Senior Labor Counsel
American Electric Power
Service Corporation
180 East Broad Street
Columbus, Ohio 43215

Attorneys for
Appalachian Power Company

APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 80-1466

APPALACHIAN POWER COMPANY,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Petition for Review and Cross-Application for Enforcement of an Order of the National Labor Relations Board.

Argued: February 6, 1981 Decided: April 8, 1981

Before BRYAN, Senior Circuit Judge, SPROUSE and ERVIN, Circuit Judges.

John A. McGuinn (Guy Farmer, Gary L. Lieber, Farmer, Wells, McGuinn, Flood & Sibal; Fredric L. Sagan, Senior Labor Counsel on brief) for Petitioner; Lafe Solomon, National Labor Relations Board (William A. Lubbers, General Counsel, John E. Higgins, Jr., Deputy General Counsel, Robert E. Allen, Acting Associate General Counsel, Elliott Moore, Deputy Associate General

Counsel, Christopher W. Katzenbach on brief) for Respondent.

PER CURIAM:

The National Labor Relations Board found that the Appalachian Power Company violated section 8(a)(5) of the Act[1] in (a) unilaterally discontinuing a company-sponsored grievance procedure upon certification of a union and (b) unilaterally terminating a five-minute washup period. Appalachian filed a petition in this court for review of the Board's order; the Board seeks enforcement.

In May 1977 a local affiliate of the United Steelworkers of America was certified as exclusive bargaining representative for a unit of Appalachian employees. Prior to the union's certification, Appalachian had a handbook which set out a company-sponsored grievance and arbitration procedure. This procedure, known as the "Green Book procedure," was available to "non-exempt employees not represented by a union." It consisted of five steps, culminating in binding arbitration by a neutral arbitrator. The company agreed to pay grievants' attorneys' fees "as determined by the . . . arbitrator to represent reasonable compensation . . . ." In addition, a grievant was permitted to have the assistance of "another unrepresented employee" in processing his grievance.

On May 24, 1977, four days after certification, Appalachian distributed a letter to its employees stating that

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[1]Section 8(a)(5) of the National Labor Relations Act, 29 U.S.C. § 158(a)(5), declares it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees."

"all . . . employees now represented by the United Steelworkers are no longer covered by [the Green Book] grievance and arbitration procedure." The newly certified union was sent a copy of the May 24 letter. It immediately protested Appalachian's unilateral abrogation of the Green Book procedure. Despite the union's request, management declined to restore the entire five-step procedure.

Because of the "high degree of probability" that unilateral action regarding mandatory subjects of collective bargaining may "frustrate bargaining opportunity," such action is "*prima facie* unlawful." *NLRB v. Cone Mills Corp.*, 373 F.2d 595, 600 (4th Cir. 1967). *See NLRB v. Katz*, 369 U.S. 736, 747 (1962). Although the Court in *Katz* did not "foreclose the possibility that there might be circumstances which the Board could or should accept as excusing or justifying unilateral action," 369 U.S. at 748, the Court observed that "[i]t will rarely be justified by any reason of substance." 369 U.S. at 747.

Appalachian argues that its unilateral abolishment of the Green Book procedure was reasonable and, in its opinion, necessary because that procedure was "fundamentally incompatible" with union representation.

There is no merit to this contention and Appalachian's good faith in advancing it does not save the company's position. An employer's good faith opinion as to the legality *vel non* of maintaining the status quo in work conditions is irrelevant in assessing the propriety of unilateral action. After a union is certified, an employer—regardless of its good intentions—is not free to change those work conditions about which it has a statutory obligation to bargain without first consulting

the union. *See Alfred M. Lewis, Inc. v. NLRB*, 587 F.2d 403, 411 (9th Cir. 1978).

Citing our decision in *Cone Mills*, 373 F.2d at 601, Appalachian also contends that the union had ample opportunity to bargain about the change. The record belies this assertion. The May 24 letter announced the withdrawal of the Green Book procedure as a *fait accompli*. Management's subsequent behavior confirms that the initial decision was final. We agree with the Board that the unilateral discontinuation of the company-sponsored grievance procedure violated section 8(a)(5) of the Act.

In mid-1977 Appalachian supervisors granted maintenance employees an extra five-minute washup period. This benefit was terminated in March 1978 without consulting the union. Substantial evidence supports the Board's conclusion that Appalachian's unilateral action regarding this condition of employment also was an unfair labor practice. *See, e.g., Wald Mfg. Co. v. NLRB*, 426 F.2d 1328, 1332-33 (6th Cir. 1970).

Accordingly, enforcement of the Board's order is granted.

ENFORCEMENT GRANTED.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 80-1466

[Filed: May 18, 1981]

APPALACHIAN POWER COMPANY,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ORDER

Upon consideration of the petitioner's petition for rehearing, by counsel,

IT IS ORDERED that the petition for rehearing is DENIED.

Entered at the direction of Judge Sprouse with the concurrence of Judge Bryan and Judge Ervin.

For the Court,

/s/ William K. Slate, II
Clerk

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
[Filed: June 4, 1981]

No. 80-1466

APPALACHIAN POWER COMPANY,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ORDER

For reasons appearing to the court,

IT IS ORDERED that the court's order of May 18, 1981 is amended. No judge requested a rehearing en banc, and, therefore, that both the petition for rehearing and the suggestion for rehearing en banc are DENIED.

Entered at the direction of Judge Sprouse with the concurrence of Judge Bryan and Judge Ervin.

For the Court

/s/ William K. Slate, II
Clerk

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250 NLRB No. 38 Morgans Landing, WV

UNITED STATES OF AMERICA

BEFORE THE

NATIONAL LABOR RELATIONS BOARD

APPALACHIAN POWER COMPANY
JOHN E. AMOS PLANT

and

Cases 9-CA-11951, 9-CA-12192, and 9-CA-12235-2

UNITED STEELWORKERS OF AMERICA LOCAL UNION NO. 8621, AFL-CIO-CLC

and

Case 9-CA-12235-1

ROBERT P. COOK, an Individual

DECISION AND ORDER

On September 28, 1979, Administrative Law Judge Marvin J. Schmitt issued the attached Decision in this proceeding. Thereafter, General Counsel filed exceptions and a supporting brief, and Respondent an answering brief in response to the General Counsel's exceptions and brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceedings to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has

decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge only to the extent consistent herewith.

We agree with the Administrative Law Judge that the Respondent did not violate Section 8(a)(5) and (1) by engaging in surface bargaining,[2] or Section 8(a)(3) and (1) by improperly conditioning and delaying the reinstatement of striking employees.[3] However, contrary to

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[1]The General Counsel has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[2]The Administrative Law Judge found, and we agree, that Respondent did not violate Sec. 8(a)(5) and (1) of the Act by stating it would not place in a signed agreement certain existing terms and conditions of employment which it intended to continue and which the Union agreed should be continued. However, Chairman Fanning in adopting this result does so not on the grounds advanced by the Administrative Law Judge but on the ground that the record fails to show that Respondent and the Union had reached agreement on both the terms and duration of the proposed provisions.

The Administrative Law Judge also found that Respondent and the Union reached an impasse in bargaining on November 4, 1977. That finding has no impact on the outcome of this case, and we, thus, do not pass on it.

[3]The Respondent initially placed an improper condition upon its acceptance of the striking employees' request for reinstatement. However, some 5 hours later it withdrew that condition and so notified the Union as soon as possible. Further, it appears that the short-lived condition had no effect upon the time at which the employees were in fact reinstated. Accordingly, we agree with the Administrative Law Judge that Respondent's acceptance was, in

[footnote continued]

the Administrative Law Judge, we find that Respondent violated Section 8(a)(5) and (1) by unilaterally terminating application of its established grievance-arbitration procedure to unit employees when the Union became their bargaining representative, and by unilaterally cancelling a 5-minute washup period for certain maintenance employees.

The Grievance-Arbitration Procedure

For many years the Respondent's personnel policies and procedures have been set forth in an employee handbook and have included a five-step grievance-arbitration procedure applicable by its terms to only "non-exempt employees not represented by a union." Prior to the certification of the Union on May 20, 1977, the unit employees[4] involved in this proceeding had been unrep-

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the circumstances here, both in effect and impact an immediate and unconditional acceptance of the employees' offer to return to work and thus not unlawful. We also find, as did the Administrative Law Judge, that the delay of 5 days in returning the employees to work was not unreasonable and thus not unlawful in view of the fact that Respondent required time to clean up and otherwise ready the plant for their return. As a consequence of the foregoing conclusions it is unnecessary for us—and we do not—consider whether the strike that began on January 18 was an economic or unfair labor practice strike, for the nature of the strike would not, in view of the fact that all strikers—insofar as the record shows—were duly returned to work, affect the results of the case. In agreeing that the delay in reinstating the strikers was not unlawful, Chairman Fanning does not rely on *Drug Package Company, Inc.*, 228 NLRB 108 (1977), cited by the Administrative Law Judge in his discussion of this issue.

[4]The certified appropriate unit is:

All probationary and regular full-time production and maintenance employees, in the Operations, Maintenance, Stores

[footnote continued]

resented and thus the grievance-arbitration procedures were available to them. On May 24—that is, 4 days after the Union was certified and without any prior or contemporary consultation or bargaining with the Union—Respondent circulated a letter to the now represented unit employees, a copy of which was sent the Union, stating:

> This letter concerns the grievance arbitration procedure which has been in effect at the Amos plant since start up.
>
> The procedure is for regular, non-exempt employees not represented by a union (Employer Manual, page 15). For this reason, all Amos employees now represented by the United Steelworkers are no longer covered by this grievance and arbitration procedure.
>
> When Appalachian Power and the union sit down to negotiate, it is presumed that a grievance and arbitration procedure will be one of the matters discussed.
>
> Meanwhile, though the formal grievance and arbitration procedure no longer applies to you, all members of management continue to be available

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and Yard departments employed at and by the Appalachian Power Company's John E. Amos Power Plant in Morgans Landing, West Virginia, but excluding all temporary employees, part-time employees, confidential employees, and all office clerical employees, plant clerical employees, managerial employees, professional employees, technical employees, General Office employees, Central Machine Shop employees, Centralized Plant Maintenance employees, construction employees and all guards, working foreman, foremen, and all other supervisors as defined in the Act, and all other employees.

to discuss any questions that you have concerning your work.

The Union telephoned Respondent concerning the letter and was told that the established grievance-arbitration procedure precluded union participation. Respondent, however, suggested that the Union submit an interim procedure to be effective until a contract was agreed upon. While no such interim agreement was produced, the parties did include grievance-arbitration procedures in their subsequent bargaining proposals and eventually agreed to certain temporary accommodations for handling grievances.

The General Counsel and Union contend that the May 24 letter was an unlawful, unilateral discontinuance of the grievance-arbitration procedure as it applied to unit employees. The Administrative Law Judge concluded there was no violation on the grounds that Respondent did not, as contended, present the Union with a *fait accompli*, but rather it offered to, and did, bargain over the grievance-arbitration issue, and that in any event the established procedure was only for unrepresented employees. For the reasons expressed below, we find that the Administrative Law Judge erred in his reasoning and result.

The May 24 letter unambiguously on its face ended the application of the grievance-arbitration procedures to unit employees. It is susceptible to no other interpretation. Furthermore, Respondent did not offer to, and in fact did not, bargain with the Union about excluding the unit employees from coverage of the grievance-arbitration procedure. At most it offered to bargain with the Union over a temporary or permanent substitute for the discontinued procedures.

Thus, we have here a situation where Respondent unilaterally changed a term and condition of employment at a time it was required to bargain with the Union concerning such matters. Such change was not justified by the language of the grievance-arbitration procedure which excluded represented employees from its coverage.[5] Accordingly, we find that Respondent violated Section 8(a)(5) and (1) of the Act by excluding unit employees from coverage of the established grievance-arbitration procedure on and after May 24, 1977.

The Washup Period

Sometime in the summer of 1977, Foremen Bowen and Saunders, without consulting higher management, granted maintenance employees working under them permission to wash up 5 minutes before their 4:30 quitting time because they worked next to coal handlers who were allowed such washup time. Maintenance employees other than those working under Bowen and Saunders were not granted a washup period. The strike involved in this proceeding began on January 18, 1978, and sometime before the end of the strike the two foremen decided—again without consulting higher management—to discontinue for their supervisees the 5-minute washup period because continuation of such a period could cause them problems. When the affected employees returned to work after the strike they were notified that permission for the washup time was withdrawn.

The General Counsel contends that the withdrawal of the washup privilege violated Section 8(a)(5) and (1)

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[5]See *The Goodyear Tire & Rubber Company*, 170 NLRB 539 (1968); *The Kroger Co.*, 164 NLRB 362 (1967).

as it was done unilaterally by Respondent—i.e. without consulting the Union—and violated Section 8(a)(3) and (1) because it was done in retaliation for the employees' striking. However, the Administrative Law Judge found no violation with respect to the change. Insofar as he held the withdrawal of the washup privilege did not violate Section 8(a)(3) and (1) we agree, for the evidence does not establish that the foremen in canceling the privilege were motivated in whole or in part by antiunion or retaliatory considerations.[6] We disagree, however, with his further conclusion that the withdrawing of washup time did not violate Section 8(a)(5) and (1). That change, as the parties all in effect agree, was made without any consultation with the Union. Consequently, it was clearly a unilateral change by Respondent in a term or condition of employment previously fixed by Respondent and made at a time when Respondent was obliged to deal with the Union concerning such matters. Accordingly, we find that by making such change Respondent violated Section 8(a)(5) and (1) of the Act.[7]

Conclusions of Law

1. Respondent is an employer within the meaning of Section 2(2) of the Act and is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

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[6]At most in this regard is the fact that the privilege was taken away when the striking employees returned. But standing alone as it does, such fact cannot support a finding of improper motive where as here the credited testimony is that the foremen acted for reasons unrelated to the employees' strike or other union activity.

[7]The fact that higher management was not consulted concerning the change or that it may well have been unaware of it is, contrary to the apparent belief of the Administrative Law Judge, irrelevant with respect to the legality of the change under the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By unilaterally discontinuing the application of the employee grievance-arbitration procedure to employees represented by the Union and by unilaterally terminating the 5-minute washup period for certain union represented employees, Respondent has refused to bargain with the Union in violation of Section 8(a)(5) and (1) of the Act.

4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

Having found that Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally abrogating certain employment benefits enjoyed by employees represented by the Union, we shall order that it cease and desist therefrom and that it reinstate the employment benefits unlawfully discontinued and take other affirmative action to effectuate the policies of the Act. We shall also order that it cease and desist from engaging in any like or related unlawful conduct.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Appalachian Power Company, John E. Amos Plant, Morgans Landing, West Virginia, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain with United Steelworkers of America, Local Union No. 8621, AFL-CIO-CLC, as the exclusive certified representative of employees in the appropriate unit by unilaterally making changes in the terms and conditions of such employees without first notifying the Union of the proposed changes and affording it an opportunity to bargain about such changes. The appropriate unit is:

> All probationary and regular full-time production and maintenance employees, in the Operations, Maintenance, Stores and Yard departments employed at and by the Appalachian Power Company's John E. Amos Power Plant in Morgans Landing, West Virginia, but excluding all temporary employees, part-time employees, confidential employees, and all office clerical employees, plant clerical employees, managerial employees, professional employees, technical employees, General Office employees, Central Machine Shop employees, Centralized Plant Maintenance employees, construction employees and all guards, working foreman, foremen, and all other supervisors as defined in the Act, and all other employees.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Upon request by the Union reinstate its established grievance-arbitration procedure for the unit employees and the 5-minute washup period for those unit maintenance employees who enjoyed such benefit before its rescission on or about March 3, 1978.

(b) Upon request, bargain with the Union concerning all proposed changes in terms and conditions of employment of the employees in the appropriate unit.

(c) Post at its John E. Amos Power Plant, Morgans Landing, West Virginia, copies of the attached notice marked "Appendix."[8] Copies of said notice, on forms provided by the Regional Director for Region 9, after being duly signed by Respondent's authorized representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 9, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that the remaining allegations in the consolidated complaint be dismissed in their entirety.

Dated, Washington, D.C., June 27, 1980.

John H. Fanning, Chairman

[8]In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

Howard Jenkins, Jr., Member

John C. Truesdale, Member

[SEAL] NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO MEMBERS

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT refuse to bargain with United Steelworkers of America, Local Union No. 8612, AFL-CIO-CLC, as the exclusive, certified bargaining representative of employees in the appropriate unit by unilaterally making changes in the terms and conditions of employment of such employees without first notifying the Union of the proposed changes and affording it an opportunity to bargain about such changes. The appropriate unit is:

All probationary and regular full-time production and maintenance employees, in the Operations, Maintenance, Stores and Yard departments employed at and by the Appalachian Power Company's John E. Amos Power Plant in Morgans Landing, West Virginia, but excluding all temporary employees, part-time employees, confidential employees, and all office clerical employees, plant clerical employees, managerial employees, professional employees, technical employees, General Office employees, Central Machine Shop employees, Centralized Plant Maintenance employees, construction employees and all guards, working foremen,

foremen, and all other supervisors as defined in the Act, and all other employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of rights guaranteed by Section 7 of the Act.

WE WILL upon request by the Union reinstate our established employee grievance-arbitration procedure for the unit employees and the 5-minute washup period for those unit maintenance employees who enjoyed such benefit before its rescission on March 3, 1978.

WE WILL notify the Union and upon its request bargain with it concerning all changes in the terms and conditions of employment of the employees in the appropriate unit.

APPALACHIAN POWER COMPANY,
JOHN E. AMOS PLANT

(Employer)

Dated _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Federal Office Building, Room 3003, 550 Main Street, Cincinnati, Ohio 45202, Telephone 513-684-3663.

St. Albans, WV

UNITED STATES OF AMERICA

BEFORE THE
NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

APPALACHIAN POWER COMPANY
JOHN E. AMOS PLANT

and — Cases 9-CA-11951, 9-CA-12192, 9-CA-12235-2

UNITED STEELWORKERS OF AMERICA LOCAL UNION NO. 8621, AFL-CIO

and — Case 9-CA-12235-1

ROBERT P. COOK, An Individual

James Horner, Esq. and *Mark Robbins, Esq.*, for the General Counsel.

John A. McGuinn, Esq., for the Respondent Company.

Robert J. Smith, Esq., for the Charging Party Union.

DECISION

MARVIN J. SCHMITT,
Administrative Law Judge.

The Union filed an unfair labor practice charge in Case No. 9-CA-11951 on November 21, 1977 and a complaint issued on January 17, 1978. The Union filed a second

unfair labor practice charge on February 13, 1978, Case No. 9-CA-12192 and a complaint issued on March 31, 1978. Robert P. Cook filed an unfair labor practice charge on February 24, 1978 (9-CA-12235-1) and the Union filed an unfair labor practice charge on March 2, 1978 (9-CA-12235-2) and a complaint issued on these charges on April 13, 1978. Thereafter, on April 13, 1978 all of the aforementioned cases were consolidated by order dated April 13, 1978. By order dated May 2, 1978 the allegations in paragraph 5(b) of the complaint issued on April 13, 1978 were withdrawn. On June 9, 1978 an amended consolidated complaint issued. This last complaint alleges various violations of Sections 8(a)(1), (3), and (5) of the Act. A hearing was held in Charleston, West Virginia on March 22, 23, 26, 27, and 28, 1979. Upon the entire record including my observation of the witnesses, and after due consideration of the briefs filed by the parties, I make the following findings of fact and conclusions of law.

Findings of Fact

Respondent, a Virginia corporation, is engaged in the generation, transmission, and sale of electric power at its John E. Amos Plant, St. Albans, West Virginia facility. During the past twelve months Respondent's gross volume of business exceeded $250,000.00. During the same period, Respondent sold electric power valued in excess of $50,000 to customers located outside the State of West Virginia. It is undisputed and I find and conclude that Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act. In addition it is undisputed and I find and conclude that the Union is a labor organization within the meaning of Section 2(5) of the Act.

At all times material herein the following named persons have been employed by Respondent in the positions set opposite their respective names and are and have been agents of Respondent, acting on its behalf, and/or supervisors within the meaning of Section 2(11) of the Act:

O. P. Cornelison	Personnel Director
J. Moore	Plant Manager
Edward C. Bradley	Personnel Supervisor
J. B. Martin	Title Unknown
H. B. Rhodes	Labor Relations Supervisor
J. E. Hammer	Wage and Salary Supervisor
James Cottrell	Maintenance Supervisor
Jerry Bowen	Maintenance Supervisor
Harold Saunders	Maintenance Supervisor
John Kaneday	Stores Supervisor
Rex O'Dell	Shift Operating Engineer
Alvie Napier	Maintenance Supervisor
Marvin Harrison	Personnel Supervisor
Art Hill	Maintenance Supervisor
Carl Handley	Maintenance Supervisor
Gary Pointer	Maintenance Supervisor
Lawrence Armstrong	Maintenance Supervisor
Bob McDaniels	Production Superintendent
Andy Trawick	Operation Superintendent
Ron Wentz	Production Superintendent
Tom Worstell	Performance Supervising Engineer
Bob Gilbert	Personnel Assistant

At all times material herein the following named individuals held the positions set opposite their names and were agents of the Union within the meaning of Section 2(13) of the Act:

Dallas Elswick	Staff Representative, United Steelworkers of America
Frank Grover	President, Local 8621
Daniel (David) Abbott	Vice President, Local 8621
Wilburn Boothe	Staff Representative, United Steelworkers of America

Judith Boyd	Staff Representative, United Steelworkers of America
Donald Younkin	Staff Representative, United Steelworkers of America

On May 20, 1977 the Board's Ninth Region certified the Union as exclusive bargaining agent of Respondent's employees in the following appropriate organizing unit within the meaning of Section 9(b) of the Act:

> All probationary and regular full-time production and maintenance employees, in the Operations, Maintenance, Stores and Yard departments employed at and by the (Respondent's) John E. Amos Power Plant in Morgans Landing, West Virginia, but excluding all temporary employees, part-time employees, confidential employees, and all office clerical employees, plant clerical employees, managerial employees, professional employees, technical employees, General Office employees, Central Machine Shop employees, Centralized Plant Maintenance employees, construction employees and all guards, working foreman, foremen, and all other supervisors as defined in the Act, and all other employees.

The Respondent Appalachian Power Company, John E. Amos Plant is one of seven major operating utility companies which are subsidiaries of the American Electric Power Company and which seven make up what is known as the American Electric Power System. There are four power plants in addition to the John E. Amos comprising the Appalachian Power Company. Three of these have the International Brotherhood of Electrical Workers as the employees' bargaining representative. Other divisions of the Appalachian Power Company are also represented by the International Brotherhood of Electrical Workers.

The complaint in this matter alleges many violations which can basically be consolidated for discussions as follows:

1. The grievance procedure
2. Was there an unfair labor practice strike
3. The surface bargaining charge
4. The reinstatement of strikers
5. The five-minute wash up period

1. *The Grievance Procedure Issue*

The employees at the John E. Amos Plant (herein called the Amos Plant) have for years been covered by a personnel booklet which the record in many instances refers to as the "Green Book" (G.C. Exhibit 2) at page 15. This booklet has the following procedure set forth:

"GRIEVANCE AND ARBITRATION PROCEDURE FOR NON-EXEMPT EMPLOYEES NOT REPRESENTED BY A UNION

"Management intends that all employees shall receive fair and equal consideration of problems or misunderstandings which may arise in connection with their jobs. If you are a regular non-exempt employee not represented by a union, the following paragraphs outline the action you should take in order that your problem or misunderstanding will receive proper attention.

"FIRST: If you have a problem or misunderstanding which affects your job, take it up with your supervisor *within five working days* of its occurrence. He will give you an opportunity to discuss the matter fully. Your supervisor will give you an answer *within three working days* following the discussion. The majority of such problems will be

of such nature that they can be settled between you and your supervisor with mutual satisfaction.

"SECOND: In case the problem or misunderstanding cannot be settled satisfactorily between you and your supervisor, you should describe your problem in writing and submit it to your Department Head *within three working days* thereafter. He will meet with you *within three working days* following receipt of your request, and will give you a written answer *within three working days* following the meeting.

"THIRD: If further review is needed, the written grievance should be submitted to your Plant Manager *within five working days* following the receipt of the reply in the second step. He will meet with you *within five working days* following receipt of your request, and will give you a written answer *within five working days* following the meeting.

"FOURTH: If the problem or misunderstanding cannot be satisfactorily resolved by the Plant Manager, you may submit it to the Executive Vice President *within five working days* following the third step answer. He or his designated representative will meet with you *within ten working days* following the receipt of your request and will provide you with a written answer *within five working days* following the meeting.

"The object in the procedure is to obtain a complete understanding of the problem and have it settled as soon as possible at the lowest supervision level commensurate with an understanding settlement.

"If your problem or misunderstanding concerns a suspension or discharge or the application or interpretation of any section of this Employee Manual, you may refer it to arbitration provided

that you have complied with the previously explained procedure. Referral of a problem or misunderstanding to arbitration is accomplished in the following manner:

"If, after receiving the answer from the Executive Vice President or his designated representative, you believe that your problem is not satisfactorily resolved, you may bring the matter before a neutral arbitrator. This must be done by giving written notice to the Executive Vice President or his designated representative *within fifteen days* after receipt of such answer of your desire to have the matter brought before a neutral arbitrator. Upon receipt of such notice from you, the Company will promptly request the American Arbitration Association to appoint a neutral arbitrator to hear your case.

"If you desire professional counsel to represent you in preparing and presenting your case to the neutral arbitrator, you may select as counsel an attorney who maintains an office in the county or adjoining county in which your assigned headquarters are located.

"The Company will pay, in addition to the cost of the arbitration hearing, such fee of your counsel as is determined by the neutral arbitrator to represent reasonable compensation in accordance with the standards for legal fees prevailing in the area. A stipulation setting forth the question to be arbitrated shall be executed by you (or your attorney acting on your behalf), and the Company and submitted to the neutral arbitrator. At a mutually satisfactory date the neutral arbitrator will hold a hearing to receive the evidence each party may have to present.

"In considering the problem, the neutral arbitrator shall not add to, detract from or modify any

part of this Plant Employee Manual. After hearing the case, the neutral arbitrator shall render a written decision which will be final and binding on both parties.

"If you request it, another unrepresented employee, employed at your work location, whom you select, (including members of management other than those who have been or might be directly involved) may assist you in any way in presenting or processing your problem or misunderstanding at any or all steps."

This procedure becomes the threshold issue here because after the certification the employer issued a letter dated May 24, 1977 (G.C. 3) which in essence indicated that this procedure no longer covered the employees in the newly certified unit because, as specifically stated in the procedure, it was for "non-exempt employees not represented by a union." A copy of this letter was sent to the Union. It also indicated a procedure with Union representation would be worked out.

The General Council and the complaint allege this discontinuance of the procedure as a unilateral change and ergo a per se violation of the Act. There is no contention nor do I find that its mere existence is a violation. The record indicates it co-exists at a number of installations currently with union contracts which are undoubtedly equipped with a grievance procedure providing for union representation.

Additionally, there is no allegation nor can it be found that its discontinuance was in retaliation for the employees' union activities since it clearly describes the employees it covers and those in the newly certified unit had to be aware they were removing themselves from that

particular group when opting for the benefits of union representation.[1]

Initially it should be noted that the employer herein could have handled this matter in a little better manner by calling a union representative in and saying something, like "we have an impossible situation here since our grievance procedure covers non-represented employees without providing for your union to participate. Therefore, let us work out an alternative interim system in which you can fully participate." However, in labor relations there are very few such perfect or precise happenings. Nevertheless, the May 24, 1977 letter did make it clear a union participant grievance procedure was contemplated and an open door policy for employees was to be maintained.[2]

As indicated, a copy of the letter was sent to the union. This communication triggered a phone call by Union Staff Representative Dallas Elswick to Marvin Morrison, Personnel Supervisor of the Employer. Mr.

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[1]Before going further, the undersigned must discuss the resolution of credibility in this situation. After observing the witnesses for five days and based upon their demeanor, the undersigned is constrained to credit the employer witnesses over those of the union. This resolution is based not only on demeanor, but other factors such as obvious lack of recall, inconsistent and conflicting testimony and certain incongruities which appeared. Basically this credibility resolution is only crucial in the comparison of the testimony of O. P. Cornelison vis-a-vis that of Frank Grover and Dallas Elswick. (*Standard Dry Wall Products, Inc.*, 91 NLRB 544.)

[2]The undersigned made a specific request to counsel for the General Counsel to brief his rationale about how such a grievance procedure could exist or be handled after certification of the union without providing for union participation. No such rationale was contained in the brief.

Morrison referred that matter to Mr. Cornelison, who then called Mr. Elswick on or about June 1, 1977. The grievance procedure was discussed with Cornelison pointing out the lack of union participation and proposing that the union offer an interim procedure to handle pending and future grievances. Mr. Elswick indicated it was no big thing, and they wanted to get along on the matter suggesting at least an inference of approval. Thereafter, negotiations were discussed and the conversation closed with a request by Mr. Cornelison for a letter covering an interim agreement on grievances.

Thereafter, Mr. Elswick failed at any time to submit a proposed interim grievance procedure. However, both parties submitted contracts which contained a grievance procedure.

At the July 8, 1977 bargaining session the Union, through Mr. Elswick, proposed that grievances be carried through the third step of the "Green Book" procedure. At this time Mr. Cornelison reminded Mr. Elswick that there had been no written proposal for an interim procedure, to which Mr. Elswick responded, "It would take a lot of time and I would probably waste my time doing it." Thereafter, through June 1, 1978 grievances were processed through the plant manager, which is the third step and union representation was provided (G.C. 10). This was done on company time with employee union representatives paid for their time by Respondent.

It should be noted that there was no evidence introduced that any grievances were not filed or processed because of the employer's decision on May 24, 1977 to the July 8, 1977 bargaining session agreement to go to the third step with union representation.

On November 21, 1977 the Union filed a charge with the National Labor Relations Board alleging the withdrawal of the "Green Book" procedure as a violation of Section 8(a)(5) of the Act.

On January 16, 1978 Mr. Cornelison called Mr. Elswick with Mr. Wilburn Boothe listening on another phone. He read the following proposal:

> The Company will agree on an interim basis to reinstate the grievance and arbitration procedure as defined in the employee manual, but with the following modifications:
>
> 1. The Union may have a representative present at any step in the grievance procedure, and
> 2. When grievances are submitted to arbitration, all costs in connection with the arbitration will be shared equally between the Union and the Company.
>
> In exchange for the above, the Union agrees that the interim arbitration procedure creates an implied no-strike clause on any matter subject to the grievance and arbitration procedure, and the Union further agrees to notify the Company at least 20 days in advance of a decision by the Union to engage in an economic strike.

A second call was made the same day to Mr. Wilburn Boothe, at which time Mr. Cornelison withdrew the no-strike portion, leaving the only differences from the "Green Book" procedure the provision for union representation throughout and the sharing of arbitration costs. Mr. Boothe rejected this offer. One day later, an NLRB complaint was issued on the charge about the grievance procedure filed on November 21, 1977.

On June 1, 1978 the parties agreed to process grievances through the fourth step of the "Green Book"

procedure (G.C. 44 and 45). This basically was the status of the grievance situation at the time the undersigned heard the case.

For a number of reasons the undersigned is of the opinion that the discontinuance of this grievance procedure was not a violation of the Act. I am, of course, aware that the employer has a duty to bargain with respect to changes in employment conditions. However, such a change must be looked at within the total picture and not in a vacuum.

To begin with, it is obvious to the undersigned that the grievance procedure as written was not compatible with union representation. The obvious deficiency is that it does not provide for union participation which is an immediate right, when the union is certified as the bargaining agent for the individuals involved.

When the change was made as described, it was not in any real sense a "fait accompli." True, it was finalized in a letter. However, in the conversation with union representative Elswick an interim procedure was requested which may or may not have been a close approximation of the "Green Book" procedure. In other words, the union was given an opportunity to bargain about the change. In fact, the undersigned finds that in the phone conversation Mr. Elswick agreed it was not a problem and basically agreed to offer a different procedure. The undersigned can only conjecture that between the phone call and the first bargaining session, Mr. Elswick consulted with someone and thereafter concluded that his posture at the bargaining table should be different than that originally agreed upon by phone. His indication that the offering of an interim procedure would be a waste of time is difficult to reconcile with the facts as presented. Although he might later argue that the employer was a

hard bargainer and, therefore, such an offer of an interim procedure might not have been accepted, he could not do so at the initial bargaining session. Throughout the entire history of the grievance procedure, up through the last offer of the employer on January 16, 1978, the union took the stubbornly tenacious position that the grievance procedure must remain exactly as written in the "Green Book" without even explaining the difference with respect to union participation.

As earlier pointed out, another factor to consider is that, as written in the "Green Book," this is explicitly a procedure for employees not represented by a union. Thus, the employees were aware that a change must take place when they selected union representation and, as the employer indicated in its withdrawal of the procedure, a union system was expected.

From a review of the total picture in this situation, one gets the impression that the union utilized this grievance procedure as a bargaining ploy, as well as the charge which was later filed respecting it. This would seem more evident when the employer's offer of January 16, 1978 was refused. This offer, rather than rigidly following the "Green Book" procedure, did allow for union representation with the only change suggested being the union sharing costs for arbitration, which is quite customary in arbitration procedures. The fact that the union rejected this offer out of hand convinces the undersigned that the alleged unilateral change of the grievance procedure by the union was more a bargaining tool than an issue with which the union was concerned.

Accordingly, the undersigned would find that this alleged unilateral change was merely an alteration of an existing procedure about which the union had an opportunity to bargain. Since the union chose not to propose

an interim procedure as requested, it is only speculation as to what that outcome would have been. I would find that the grievance procedure change did not violate Sections 8(a)(1), (3), or (5) of the Act.

Significant in this decision is the fact that the parties continuously discussed and processed grievances, initially through the third and ultimately the fourth steps.

The employer argues that continuing the "Green Book" grievance procedure would violate other sections of the law by contributing benefits to the union, including the payment of the union attorney. Although there is some merit to this argument, I do not believe that it need be treated here in detail.

2. *The Unfair Labor Practice Strike Issue*

The importance of determining whether or not the strike engaged in by the employees was an unfair labor practice strike has somewhat been dissipated by the withdrawal of an allegation that a striker was illegally discharged (Robert Cook).

All parties appear consistent in claiming that the only basis for the unfair labor practice strike arose from the charge alleging that the withdrawal of the "Green Book" grievance procedure was an unfair labor practice.

Somewhat strangely in this situation, the union took a strike vote on January 16, 1978 but retained the ballots in a sealed manner until the charge filed with the National Labor Relations Board regarding the grievance procedure had been investigated and, in fact, a determination reached with respect to its outcome. Thus, when notice was received on January 17, 1978 that a complaint would issue, the votes were counted and the plans were made to strike.

The undersigned is puzzled by the sequence of events here, and even if the "Green Book" grievance procedure problem had been determined to be an unfair labor practice, I still would not find that the strike engaged in was an unfair labor practice strike. The Board has long held that unfair labor practice strikes are caused or arise from an employer's unfair labor practices. Here, the situation was different. Obviously the employees had determined to strike before any NLRB determination was made with respect to the withdrawal of the "Green Book" procedure. Thus, it would seem that the mere fact that subsequently a complaint would be issued does not put the imprimatur of an unfair labor practice strike on something that had already been determined. Basically, the primary concern was reaching a contract agreement and had little to do with the withdrawal of the "Green Book" procedure.

Counsel for the General Counsel suggests that the union representatives were somewhat naive and were not "labor lawyers" and, thus, in effect needed the decision of the NLRB in order to enter upon what was termed an unfair labor practice strike. This argument just won't wash. The union had legal advice throughout and yet, supposedly seized upon an incident that took place some six months before as the alleged springboard for an alleged unfair labor practice strike.

Accordingly, the undersigned would find that the strike commencing on January 17, 1978 and ending on February 27, 1978 was not an unfair labor practice strike. Basically, it almost seems that the proverbial "accident looking for a place to happen" was the basis for the alleged unfair labor practice. It is not rational that a strike vote can be taken authorizing a strike only if permission is given because a NLRB complaint issues.

It then becomes quite obvious that the cause and effect are not present and the alleged unfair labor practice was not the real basis for the strike. It was really dissatisfaction with the contract negotiations, which I also do not find as unfair labor practices.

3. *The Surface Bargaining Allegation*

Administrative Law Judge Exhibit No. 1 is a setting forth of the bargaining meetings which had taken place from the commencement of bargaining up through April, 1978. It indicates 18 bargaining sessions with the last 7 or 8 attended by a federal mediator.[3]

Initially, counsel for the General Counsel on the first day of hearing indicated on the record certain items that he regarded as violations. For example, the use of Paragraph 7(c) of the complaint where it contends the employer refused to include in the written collective bargaining agreement terms and conditions formerly agreed upon by the Respondent and the union. Counsel for the General Counsel indicates break time, safety committee, and shift preference, and the agreement

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[3]At the close of the hearing in this matter the undersigned requested of counsel for the General Counsel a brief pointing out the specific areas of alleged violations with respect to the surface bargaining and, additionally, the reasons. First of all, the documentary exhibits were introduced at the start of the hearing in one massive grouping because of the peculiar circumstances under which this hearing was held. That is the prior Administrative Law Judge died. Unfortunately, the brief for counsel for the General Counsel talks in generalities and in conclusionary fashion with respect to the violations, particularly in the area of the surface bargaining charge. In effect, he tells me to look at the documents and they will prove to me the violations, without saying what documents. Accordingly, it becomes difficult to review the bargaining merely on a general basis without specifics of consequence.

section. With respect to Paragraph 7(e) dilatory tactics, counsel indicates that these were from October 14, 1977 through January 27, 1978 including January 9, 1978, February 2, 1978, February 9 or 10, 1978, February 14, 1978, February 28, 1978, and March 6, 1978 (Section 7(f) of the complaint). In dealing with proposals that would be unacceptable to the union, counsel for the General Counsel indicated the section on temporary employees, management rights, mutual responsibilities, adjustment of differences, in particular sections 1 and 3, article 6, seniority, promotions, and transfers, article 7, working conditions, in particular sections 1, 7, 13, 18, 19, and 11. They then continued with article 8, in particular section 4(3) and section 4(f), article 9, vacations, in particular section 6 relating to the choice of vacation period, article 10, leaves of absence, article 11, waiver of bargaining. The brief of counsel for the General Counsel fails to present specifics concerning these.

The preceding paragraph lists many of the terms and conditions of employment that were discussed and proposed in contract proposals. However, the undersigned is totally unimpressed with the allegation that these were conditions under which the *Reed and Prince* doctrine, 204 F.2d 131 (C.A. 1, 1953) at p. 139, would enter into the picture; that is, no self-respecting union would abide by or accept them. It is true that counsel for the General Counsel advances various items about which there was disagreement, but I fail to see any that would prevent the parties from reaching agreement or would be totally unacceptable to the union. Specific items will be discussed later in this decision. This becomes clear upon review of G.C. Exhibit 23 which narrows the issues to eight factors.

Initial bargaining commenced on July 7, 1977, at which point in time the union presented the employer with a proposed 55-page contract covering almost all items except wages rates. On July 7 and July 8 the parties reviewed this agreement. On August 3, 1977 the employer presented the union with a 48-page written proposal, again covering most subjects except wages (G.C. Exhibit 11). Two more meetings on August 3 and August 4 reviewed the employer's bargaining proposals. Meetings took place on August 19 and August 25 with little change in position by either party, and on August 26, 1977 the employer submitted five written proposals altering its original position. These were included as G.C. Exhibits 12(a) through 12(e) and covered bulletin boards, union officers and delegates, discharge and appeal, wage rate establishments on new jobs, and a counter-proposal on the agreement section.

There is a minor issue concerning the inclusion of Local 8621 in the agreement section of the contract. The employer's August 3, 1977 proposal only included the certified International. Later, on August 26, 1977, it was agreed to include Local 8621 with the union submitting a letter indicating Local 8621 would be composed of Amos Plant employees. At a later session, the union abortively withdrew its initialed approval of this. Subsequent contract offers of the employer did not show the local in the agreement section. However, throughout all the bargaining, the employer agent dealt with Local 8621 officials, including its president, Frank Grover. The law is clear that the employer may require both names on a collective bargaining agreement, but must recognize a local designated by an International. Here we are dealing only with a technical point. There was no refusal to bargain with the local, but concern

about possible intervention in contract dealings by individuals other than employees of the employer and union representatives. I would disagree with counsel for the General Counsel when he says it would not cost the employer anything. The complement of a local union while not the employer's business can surely have an impact on bargaining. In any event, I do not see this technical point as indicative of or establishing a refusal to bargain.

Counsel for the General Counsel at page 3 also talks in terms of a more restrictive proposal on bulletin boards in the October 14 proposal over an August 3 proposal. However, it is clear that G.C. Exhibit 12(a) is a much more liberalized position with respect to both bulletin boards and, in fact, was agreed to by the union. This identical bulletin board proposal, which was adopted by the union, was included in the October 14, 1977 employer proposal, G.C. Exhibit 20. Frankly, I do not understand counsel for the General Counsel's allegation in this area.

In a perusal of this massive record, the undersigned can find only one item which he might say the parties agreed upon which the employer did not choose to include in the contractual agreement, and that is the break period procedure which had been in existence for some time. The problem with the break period was it was not so much an agreed upon item, as it was an established practice that the employer contended it would continue, but did not wish in a collective bargaining agreement. Counsel for the General Counsel seemed to take the position that all existing practices must be included in any collective bargaining agreement between an employer and the union. Frankly, this is not my understanding of the law in this area. *Midwestern*

Instruments, Inc., 133 NLRB 1132. Another example of this allegation is the fact that employees in the past had been given a discount on electric bills. Here, again, the employer clearly stated it had no intentions of deviating from this policy, but because of the possibility of conflict with the Public Service Commission, it did not choose to include them in the agreement. Counsel for the General Counsel argues that the employer's zipper clause would effectively take these away from the employees. However, to take that position one must assume that this employer had no intention of keeping its written word without any indication of the basis for such a contention.

With respect to the safety committee issue, this was never an agreement between the parties, but it was proposed as a side agreement by the employer. The safety committee proposal had never specifically been agreed to by the union, and so when the employer, as part of its October 14, 1977 offer, included a separate agreement with respect to a safety committee which was, again, much more liberal than its original position, it was not an agreed upon item, but a proposal for a side agreement which the employer chose not to put into the collective bargaining contract because it was not sure it would be perpetuated in future contracts. This is hardly an agreed upon item that the employer refused to put into a collective bargaining agreement.

Perhaps a summarization of the bargaining all the way through to the end would be in order here.

1. July 7, 1977—Union submits contract proposal G.C. 9.

2. August 3, 1977—Employer submits contract proposal G.C. 11.

3. August 26, 1977—Employer submits five written counterproposals, Exhibits 12(a) through 12(e).

4. September 8, 1977—Employer withdrew counterproposals, G.C. Exhibits 12(b), (c), and (d) because of union rejection.

5. September 22, 1977—Employer changes position on the dues check off issue, G.C. Exhibit 18(b).

6. September 22, 1977—Employer submits amended language on wage agreement, union representation in the grievance procedure, pay for union members at grievance procedures, and jury duty, G.C. Exhibits 18(c) through 18(f).

7. October 14, 1977—Employer submits what is termed its best and final offer, G.C. Exhibit 20.

8. October 19, 1977—Union notifies the employer that it has rejected the employer's proposed contract.

9. October 25, 1977—Union by letter indicates 8 points which are necessary for the union committee to recommend the employer's contract to membership for ratification.

10. November 2, 1977—Union requests bargaining sessions on November 11, and November 14, 1977, G.C. Exhibit 24.

11. November 8, 1977—Employer sends a mailogram questioning the need for additional bargaining sessions and explaining that the employer's response to the union's demands of October 25, 1977 are in the mail.

12. November 8, 1977—Employer responds to union's demands for eight changes in the employer's October 14, 1977 contract offer and indicates that the October 14 offer is still open, and that the parties meeting would be to restate the same position.

13. November 17, 1977—Union indicates it has contacted a federal mediator, G.C. Exhibit 27.

14. November 22, 1977—Employer by letter notifies the union it is now withdrawing its offer of October 14, 1977; a carbon copy of this is sent to mediator, G.C. Exhibit 28.

15. April 24, 1978—Employer submits another contract proposal, G.C. Exhibit 40.

The foregoing briefly summarizes the documentary exchange between the parties. Also, as part of the flow, the union submitted an hourly wage demand on March 17, 1978 which the employer characterized as a 20%-23% increase and countered with a 6% offer which was rejected. In G.C. 40, the April 4, 1978 contract offer, the employer basically upped its wage offer to 7% which was rejected. Thereafter, the employer put this wage into effect without serious union opposition.

In reviewing the bargaining, the undersigned is convinced that as of November 8, 1977 the employer's October 14, 1977 offer and the exchange of documents on the eight points had created an impasse with both parties holding fast to their positions. It is true that the union asked for bargaining sessions on two dates with the employer responding that it saw no useful purpose with both holding firm to the same positions. The record is devoid of any indication that the union suggested that its position had changed in any fashion from the eight points it had indicated were essential to reaching a collective bargaining agreement.

Paragraph 7(d) of the complaint in this matter alleges that the employer refused to make any proposals upon which the parties could negotiate after November 22, 1977. This complaint issued on June 9, 1978. I fail to

comprehend why the complaint takes no cognizance of G.C. Exhibit 40. I can only assume that the complaint talks in terms of the period from November 22, 1977 until early 1978 when bargaining commenced under the leadership of the mediator.

With respect to Paragraph 7(e), there are apparently four factors that are present in this allegation. First, is the letter sent by the union after the October 14, 1977 contract offer of the employer, wherein the union indicated first of all that there were eight points that it needed to reach a contract, and then in a separate letter requested two bargaining sessions, to which the employer responded that since the parties were in the same position with respect to the eight points, it saw no need for an additional bargaining session at that time. As I indicated, I would clearly find the parties were at an impasse at this point in time, and that after the mediator was brought in, it appears that he was the guiding force in setting bargaining sessions and he did not make any move in this direction until early 1978. Accordingly, I could not find that dilatory tactics are involved wherein meetings were scheduled and cancelled by the employer. These are apparently put forth as a basis for the employer engaging in dilatory tactics. On one of these occasions, there had been a picket line incident the night before which the undersigned need not go to the severity of. In any event, it caused the employer to cancel the following day's bargaining session. Exhibit 5 is a copy of a settlement agreement with a nonadmission clause entered into between the union and the employer and the National Labor Relations Board.

One more date was cancelled by the employer, which resulted from the fact that the National Labor Relations Board was to be at the employer's plant investigating

an unfair labor practice charge, and the employer's representatives needed to be present. This seems to be the sum total of the dilatory tactics alleged by counsel for the General Counsel as violations of Section 8(a)(5) of the Act. Certain testimony was introduced indicating that the employer, on certain occasions, took into consideration the fact that it had other plants and other employees operating under similar conditions, and this, then, was a factor in their bargaining with respect to the union. This, again, would seem to be a legitimate economic or fact-of-life consideration, and so long as it did not prevent agreement, it does not seem to be a consideration which could not be advanced.

The foregoing basically are the apparent considerations which invoked Paragraph 7(b) through 7(f) of the complaint issued in this matter. Based upon this record, I cannot find that the employer negotiated in bad faith with no intention of entering into any final or binding collective bargaining agreement. This argument falls in and of itself because *on two occasions,* representatives of the union recommended acceptance of employer contracts which, if accepted, of course would have been a final and binding collective bargaining agreement. In addition, I do not find that there was any refusal to include in the collective bargaining agreement terms or conditions of employment agreed upon by the Respondent and the union. It does appear there were certain minor past practices which the union wished continued and which the employer agreed they would so continue, but were not made a part of the collective bargaining agreement because the employer chose not to put them in the agreement. However, there is no indication whatsoever that these would have stopped and, as indicated in the case law, such minor company policies do

not always need to be included in collective bargaining agreements. Also telling is the fact that, obviously, most of the employer proposals were acceptable since Exhibit G.C. 23 (the union's eight-point demand) would indicate the balance of items were palatable.

The allegation of refusal to make proposals after November 22, 1977 again falls because there were additional proposals made which were different from the others. Counsel for the General Counsel generalizes that the three contract proposals of the employer are extremely similar. However, in each there were changes and concessions, and the undersigned cannot find that proposals were not made. It is true that there was an impasse reached and a period of bargaining did not take place. However, this delay from November, 1977 to January, 1978 was not strictly the result of employer conduct.

As also indicated, I do not see any dilatory tactics or failure to meet and confer at reasonable times and intervals. The delay from November, 1977 to January, 1978 has been analyzed and the two dates the employer failed to meet scheduled bargaining sessions have been adequately explained by the circumstances. Accordingly, based upon the entire record, the undersigned would find that the surface bargaining charge has no merit. To find otherwise would be to sit in judgment upon the substantive terms of the collective bargaining agreement. *American National Insurance Co.*, 343 U.S. 395.

4. *The Strike and the Offer to Return to Work*

Paragraphs 11, 12, 13 and 14 deal with the strike which took place roughly from January 18, 1978 through February 27, 1978. As previously indicated, the fact

as to whether this strike was an unfair labor practice strike really does not need resolution because of the withdrawal of the charge with respect to the alleged discriminatory discharge of an employee.

As previously indicated with respect to the strike resolution, the undersigned would credit the testimony of employer representative Cornelison over that of Mr. Elswick, the union representative. On Sunday, February 26, 1978, Mr. Cornelison and Mr. Elswick had a conversation, at which time Mr. Elswick indicated that the employees wanted to return including a discharged striker. At this point in time, Mr. Cornelison advised Mr. Elswick that not only would the employer not accept the one discharged employee back, but that there has been another discharge.[4]

Mr. Cornelison states that Mr. Elswick did not retreat from his position with respect to Mr. Cook during this conversation. I find this more credible for two reasons. First of all, the employees voted to return with Cook, and secondly, I cannot conceive of Mr. Elswick finding out about the second discharge and at the same time agreeing to return. Accordingly, I would find that the unconditional offer to return to work did not take place until the following day. During this conversation, Mr. Cornelison requested a 30-day strike notice from the union upon their return to work, and Elswick indicated that he would have trouble with something like this.

At 3:30 p.m. on February 27, 1978, Mr. Cornelison received the telegram offering unconditional return by the strikers. At 5:10 p.m., Cornelison called Elswick to

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[4]It should be noted that apparently a charge was filed on this second discharge and not proceeded on for whatever reason.

make sure the two discharged employees were not to return. At this time, Mr. Cornelison requested a 15-day strike notice, and Mr. Elswick responded he had trouble with any notice whatsoever.

At a conference of employer representatives, it was determined at 8:30 p.m. on February 27, 1978, that no strike notice would be requested, and the employees would return upon a determined schedule. At that time, Mr. Elswick was called but was not home. He returned the call at 6:30 a.m. the following morning and was advised that no strike notice was needed, and the employees would be called back to work.

At this point, it should be noted that this employer is a public utility. This obviously does not give it special privileges. However, the impact of a strike and the possible shutdown of a utility become a much more significant public matter. Thus, this employer in an effort to operate during a strike, had people move in to the plant, set up kitchens, brought in beds and created living conditions inside the plant so that electric power could be supplied to consumers, a not unusual occurrence in such a situation. This preliminary is set forth because at that point in time (the strike end), a determination had to be reached as to when the existing set-up at the plant could be cleaned up with respect to the moving out of the stoves, beds, food and other equipment so that the plant could return to normal procedure. It was determined that the earliest possible return date and time was 12:01, Friday, March 3, 1978, and the union was so notified.

It thus appears that the employer's position with respect to a strike notice after an unconditional offer was that it only existed from approximately 3:30 p.m. on February 27, 1978, until 8:30 p.m. on that same date.

It is true that the notice was not received by Mr. Elswick until the following morning. However, there is no denial that calls were made and messages left with Mrs. Elswick for a return call by Mr. Elswick. The employees returned, as indicated, at 12:01 on March 3, 1978.

Basically, two issues are involved. First of all, was the employer's initial two requests for strike notice prior to return of the employees a violation. Case law is clear that an employer must accept an unconditional return to strikers, regardless of whether they are unfair labor practice or otherwise. In this instance the initial request for 30-days strike notice was made *prior to* the time that the union unconditionally requested a return. The employer suggests that it asked for the deadline because it had heard that some of the employees had engaged in a strike at some other location and returned to work only to go right back out again. Whether this be true or not seems irrelevant, since only approximately five hours existed during which a no strike condition was put forth as a bar to striker return. Thus, I cannot find that this short period falls under the case law which finds it illegal to present conditions for returning strikers.

Next, we then reach the problem of preparing the plant for the employees to return. I think a consideration here was the fact that it was a somewhat bitter strike, based upon the allegations of violence. Accordingly, I cannot see that it is unreasonable for the employer to try to clean up the plant, removing stoves, food, and bedding and bringing it back to its normal operating conditions prior to returning the employees. Thus, I would find there was no undue delay involved and, as pointed out by counsel for the employer, the Board allows five days for the return of unfair labor practice strikers.

5. *The Alleged Unilateral Change with Respect to Wash-up Time*

At a disputed time (I would find about six months) certain maintenance employees supervised by a Mr. Saunders and a Mr. Bowen were granted permission to wash up five minutes before the regular maintenance department quitting time of 4:30 p.m. This apparently arose from a complaint by their employees that the coal handlers (not maintenance employees) were washing up at 4:25 p.m., and the men supervised by Saunders and Bowen worked in proximity to these coal handlers. No other maintenance employees enjoyed this privilege, and Saunders and Bowen did not consult higher supervision in making this change.

Again, it is undisputed that some time prior to the strike, Mr. Bowen and Mr. Saunders mutually had discussed the situation and wondered if they weren't in for problems because they had granted this procedure. Accordingly, they had reached a decision with respect to stopping the additional allowance of five minutes of the employees under their supervision. Thus, when the employees returned from the strike, both Mr. Saunders and Mr. Bowen advised the employees that they could not continue with the extra five-minute allowance for wash-up time. None of the employees involved filed a grievance over this matter.

It appears that the complaint over this particular incident was issued based upon two factors. First of all, that a unilateral change took place, in other words without bargaining with the union, and secondly, the timing with respect to returning strikers. There was no evidence introduced to indicate that higher supervision was aware either of the initial change by Mr. Bowen and

Mr. Saunders or the last change, reverting to the original program. There is some question as to when the practice was started. I do not believe this needs to be resolved because there is no doubt that in the maintenance department the policy had always been that employees will work until quitting time without washing up earlier, and that the privilege for the coal operators was primarily because they apparently had the dirtiest job and needed extra wash-up time, which was continued after they had also struck. Thus, two first-line supervisors took it upon themselves to change the working conditions, and subsequently took it upon themselves to change them back without consultation in either instance with higher supervision.

Accordingly, it is true that the change was made without consultation with the union. However, there is no suggestion that anyone but these few employees and two minor supervisors are involved. Under the circumstances, this hardly raises it to the level of a unilateral change requiring bargaining, particularly when there is no dispute that the maintenance department as a whole policy-wise must work through without earlier wash-up time. Accordingly, the undersigned would find that there is no violation of Section 8(a)(5) of the Act with respect to this slight alteration of work time. It is also incongruous to assume two minor supervisors chose to retaliate against their small crew because some or all of them had gone on strike. I see no violation of Section 8(a)(1) or (3) of the Act.

The original record in this matter contains material with respect to the alleged discriminatory discharge of an employee, Robert Cook. Subsequent to the hearing, a motion was filed requesting withdrawal of discharge, which motion is hereby granted and, accordingly, no

discussion of that particular allegation will be entered into.

Decision[5]

Based upon the foregoing discussion and resolutions, the undersigned would dismiss the complaint in its entirety, finding no violation of Sections 8(a)(1), (3), and (5) of the Act.

Dated, Washington, D.C., September 28, 1979.

/s/ Marvin J. Schmitt
Administrative Law Judge

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[5]In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings and conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

May 24, 1977

To: Union Represented Employees:

This letter concerns the grievance and arbitration procedure which has been in effect at the Amos Plant since startup.

The procedure is for regular, non-exempt employees not represented by a union (Employee Manual, page 15). For this reason, all Amos employees now represented by the United Steelworkers are no longer covered by this grievance and arbitration procedure.

When Appalachian Power and the union sit down to negotiate, it is presumed that a grievance and arbitration procedure will be one of the matters discussed.

Meanwhile, though the formal grievance and arbitration procedure no longer applies to you, all members of management continue to be available to discuss any questions that you have concerning your work.

/s/ J. A. Moore

JAM:cw
xc-Amos Supervision
United Steelworkers of America

GRIEVANCE AND ARBITRATION PROCEDURE FOR NON-EXEMPT EMPLOYEES NOT REPRESENTED BY A UNION

Management intends that all employees shall receive fair and equal consideration of problems or misunderstandings which may arise in connection with their jobs. If you are a regular non-exempt employee not represented by a union, the following paragraphs outlines the action you should take in order that your problem or misunderstanding will receive proper attention.

FIRST: If you have a problem or misunderstanding which affects your job, take it up with your supervisor *within five working days* of its occurrence. He will give you an opportunity to discuss the matter fully. Your supervisor will give you an answer *within three working days* following the discussion. The majority of such problems will be of such nature that they can be settled between you and your supervisor with mutual satisfaction.

SECOND: In case the problem or misunderstanding cannot be settled satisfactorily between you and your supervisor, you should describe your problem in writing and submit it to your Department Head *within three working days* thereafter. He will meet with you *within three working days* following receipt of your request, and will give you a written answer *within three working days* following the meeting.

THIRD: If further review is needed, the written grievance should be submitted to your Plant Manager *within five working days* following the receipt of the reply in the second step. He will meet with you *within five working days* following receipt of your request, and

will give you a written answer *within five working days* following the meeting.

FOURTH: If the problem or misunderstanding cannot be satisfactorily resolved by the Plant Manager, you may submit it to the Executive Vice President *within five working days* following the third step answer. He or his designated representative will meet with you *within ten working days* following the receipt of your request and will provide you with a written answer *within five working days* following the meeting.

The object in the procedure is to obtain a complete understanding of the problem and have it settled as soon as possible at the lowest supervision level commensurate with an understanding settlement.

If your problem or misunderstanding concerns a suspension or discharge or the application or interpretation of any section of this Employee Manual, you may refer it to arbitration provided that you have complied with the previously explained procedure. Referral of a problem or misunderstanding to arbitration is accomplished in the following manner:

If, after receiving the answer from the Executive Vice President or his designated representative, you believe that your problem is not satisfactorily resolved, you may bring the matter before a neutral arbitrator. This must be done by giving written notice to the Executive Vice President or his designated representative *within fifteen days* after receipt of such answer of your desire to have the matter brought before a neutral arbitrator. Upon receipt of such notice from you, the Company will promptly request the American Arbitration Association to appoint a neutral arbitrator to hear your case.

If you desire professional counsel to represent you in preparing and presenting your case to the neutral arbitrator, you may select as counsel an attorney who maintains an office in the county or adjoining county in which your assigned headquarters are located.

The Company will pay, in addition to the cost of the arbitration hearing, such fee of your counsel as is determined by the neutral arbitrator to represent reasonable compensation in accordance with the standards for legal fees prevailing in the area. A stipulation setting forth the question to be arbitrated shall be executed by you (or your attorney acting on your behalf), and the Company and submitted to the neutral arbitrator. At a mutually satisfactory date the neutral arbitrator will hold a hearing to receive the evidence each party may have to present.

In considering the problem, the neutral arbitrator shall not add to, detract from or modify any part of this Plant Employee Manual. After hearing the case, the neutral arbitrator shall render a written decision which will be final and binding on both parties.

If you request it, another unrepresented employee, employed at your work location, whom you select, (including members of management other than those who have been or might be directly involved) may assist you in any way in presenting or processing your problem or misunderstanding at any or all steps.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 80-1466

APPALACHIAN POWER COMPANY,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR CLARIFICATION OF OPINION AND ORDER

Appalachian Power Company, by its attorneys, hereby petitions the Court for clarification of the Opinion and Order in this proceeding.

The Court has ordered the Company to reinstate, upon request by the Union, a grievance-arbitration procedure designed for non-represented employees which pre-existed the certification of the Union and provided for no Union participation.

While this case was pending the Union and the employer negotiated and made effective on May 10, 1979 a full collective bargaining agreement containing, *inter alia,* a complete grievance-arbitration procedure for Union represented employees. Subsequently, on May 1, 1981, the agreement was renewed and the renewal agreement also contained a complete grievance-arbitration proce-

dure negotiated in good faith. This renewal agreement was executed on April 30, 1981 and made effective May 1, 1981, and will remain in effect until April 30, 1984. This was subsequent to the issuance of the Court's Order, dated April 8, 1981.

Thus, the contractual grievance-arbitration procedure, providing for full Union participation, was executed and made effective after the Court's Order requiring reinstatement of the old procedure had been issued and certainly after the Union was aware of the Order, as they so indicated at thte bargaining table during the most recent negotiations.

On May 13, 1981, the Union wrote a letter to the Company requesting reinstatement of the non-Union grievance-arbitration procedure. This letter is attached hereto as Appendix A. This was done despite the fact (1) that the Union had a negotiated grievance-arbitration procedure in place which provided for full traditional Union representation in the entire grievance-arbitration procedure and (2) that the non-Union procedure specifically designed for non-represented employees expressly excluded a Union from participation. The non-Union procedure and the current negotiated procedure are attached hereto as Appendices B and C in order that the Court may see for itself the basic differences in the two procedures. The non-Union procedure is incompatible with Union representation as may be plainly seen because it excludes the Union from an participation. The negotiated procedure, now a part of the current agreement, provides for full Union participation and is typical of negotiated grievance-arbitration clauses.

The Union, through the processes of free collective bargaining, negotiated this latter procedure and placed it in the current agreement with knowledge that a panel

of this Court had ordered the reinstatement of the non-Union procedure upon request. The Union negotiated this Union procedure without reservation or qualification. We suggest, therefore, that this negotiated procedure should be held to supercede the prior non-Union procedure.

Under these circumstances, the Board's Order, as enforced, is fraught with uncertainty, complexity and confusion. A serious question has to be raised as to which of the two procedures (the non-Union or the Union-negotiated procedure) governs the handling of grievances. Certainly, both procedures cannot be followed simultaneously. Does the Court Order abrogate the contract procedure? Does the Union have, for each grievance, a choice of procedures? We believe it is more reasonable and consonant with the collective bargaining process to hold that the intervening circumstances, whereby the Union has voluntarily negotiated a different Union-oriented procedure, has the effect of nullifying the non-Union procedure.

There is another significant factor which makes it incomprehensible that the Union should seek reinstatement of the non-Union grievance-arbitration procedure. That procedure was included in an employee manual containing employee benefits, rules, and working conditions. The grievance-arbitration procedure specifically provided primarily that an employee could only arbitrate the interpretation or application of the employee manual. That manual was discontinued in 1979 and the discontinuance was not an issue in this case. Arbitration of the non-Union procedure would merely give employees the hollow right to arbitrate provisions of a non-existent obsolete "manual". It would not give them

the right to arbitrate the provisions of their own current collective bargaining agreement.

These are important issues, which deeply affect the day-to-day handling of grievances and stability of labor relations at Appalachian Power Company.

Because of the importance of these issues, we respectfully request that the Court clarify its Opinion and Order. We further submit that the current collective bargaining agreement containing provisions for the handling of grievances and arbitrations should render moot the requirement of the Board Order that the Company reinstate the non-Union grievance and arbitration procedure.

Respectfully submitted,

/s/ Guy Farmer

/s/ John A. McGuinn
Farmer, Wells, McGuinn,
Flood & Sibal
1000 Potomac Street, N.W.
Washington, D.C. 20007

/s/ Fredric L. Sagan
Senior Labor Counsel
American Electric Power
Service Corporation
180 East Broad Street
Columbus, Ohio 43215

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Petition for Clarification of Opinion and Order was served by first class mail, postage prepaid, this 1st day of June, 1981, upon the following:

Elliott Moore, Esq.
National Labor Relations Board
1717 Pennsylvania Avenue, N.W.
Washington, D.C. 20570

/s/ Guy Farmer

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 80-1466

[Filed: June 23, 1981]

APPALACHIAN POWER COMPANY,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ORDER

Upon consideration of the petition for clarification of opinion and order and, the response to the petition, by counsel,

IT IS ORDERED that the motion of Appalachian Power Company for clarification of opinion and order is DENIED.

Entered at the direction of Judge Sprouse with the concurrence of Judge Bryan and Judge Ervin.

For the Court,

/s/ William K. Slate, II
Clerk

ARTICLE V.

ADJUSTMENT OF DIFFERENCES

Section 1. GRIEVANCE PROCEDURE

(a) Should any dispute or disagreement arise between an employee and the Company, except as provided in Article III, such dispute or disagreement shall constitute a grievance and shall be processed and resolved as follows:

First Step—The grievance shall be presented orally by the employee to his immediate supervisor within six (6) calendar days after the incident or occurrence giving rise to it except as provided in Article VI, Section 2. The supervisor shall reply to the grievance within six (6) calendar days following its presentation to him.

Second Step—If the grievance is not settled in the first step, then within six (6) calendar days after the supervisor's reply, the aggrieved employee or the Union may submit the grievance in writing to his department head, who shall meet with the aggrieved employee within six (6) calendar days after receipt of the grievance. The department head shall give an answer in writing within six (6) calendar days of the meeting.

Third Step—If the grievance is not settled in the second step, then within six (6) calendar days after the answer has been given in the second step, the aggrieved employee or the Union may appeal the grievance in writing to the Plant Manager, who shall meet with the aggrieved employee within six (6) calendar days after receipt of the grievance. The Plant Manager shall give an answer in writing within six (6) calendar days of the meeting.

Fourth Step—If the grievance is not settled in the third step, then within fifteen (15) calendar days after

the answer has been given in the third step, the aggrieved employee or the Union may request a meeting with a designated representative of the President of Appalachian Power Company. The International Staff Representative shall have the right to attend this meeting, which shall be held not later than fifteen (15) calendar days following receipt of the request for the meeting. The answer shall be given in writing within fifteen (15) calendar days of the meeting.

(b) If the Company fails to meet any of the time deadlines set forth in the foregoing grievance procedure, the grievance shall be deemed denied as of the expiration of the time limit (unless time is extended by mutual consent in writing). The employee or the Union may then proceed within the time limits specified in each step to the next step of the grievance procedure. If the aggrieved employee or the Union fails to meet any of the time deadlines set forth in the foregoing grievance procedure (unless the time is extended by mutual consent in writing) the grievance shall be deemed withdrawn.

(c) A Union representative may be present with the aggrieved employee(s) at any of the meetings provided for above in the four steps of this grievance procedure.

(d) At the first and second steps of the grievance procedure, one aggrieved employee and one designated Union representative (if an employee) and at the third step one aggrieved employee and two designated Union representatives (if employees) shall not lose their regular straight time pay for time spent at such grievance meetings if held during their scheduled hours of employment.

(e) A grievance may be filed by the Union on behalf of any employee or group of employees in regard to any dispute or disagreement, except as provided in Article III.

Section 2. APPEAL FROM SUSPENSION OR DISCHARGE

(a) Any regular employee who is suspended or discharged may bypass the first two steps of the grievance procedure and submit a grievance in writing to the Plant Manager at the third step. Such grievance must be submitted within seven (7) calendar days following the date the employee was notified of a suspension or discharge and will otherwise be handled in accordance with the grievance procedure as heretobefore defined.

(b) If two or more regular employees are suspended or discharged under the provisions of Article III, such employees may submit a joint grievance under the provisions of paragraph (a) of this Section 2.

Section 3. ARBITRATION PROCEDURE

(a) In the event of failure to satisfactorily settle or adjust any grievance involving an allegation of a violation of a term or the terms of this Agreement according to the foregoing procedure, then within fifteen (15) calendar days after the denial of the grievance in the Fourth Step of the grievance procedure, such arbitrable grievance may be submitted to arbitration by the Union in the following manner:

(1) The Union shall within said fifteen (15) calendar day period give written notice to the Company of its desire to arbitrate the grievance.

(2) The Company and the Union may then attempt to agree on a wholly disinterested person to act as neutral arbitrator.

(3) If, within fifteen (15) calendar days of receipt of the Union's written notice to arbitrate, the Company and the Union have not agreed upon the selection of a neutral arbitrator, the Company

shall request a panel of arbitrators from the Federal Mediation and Conciliation Service.

(4) The Company and the Union then shall without delay select an arbitrator from the panel or panels submitted by the Federal Mediation and Conciliation Service.

(5) The arbitrator shall hold a hearing on a date satisfactory to the Company and the Union, for the purpose of receiving such evidence as they may have to present with respect to the grievance.

(6) Within thirty (30) calendar days after the receipt by the arbitrator of all arguments, documents, and records pertaining to the grievance, he shall render in writing a statement of findings and a decision. Such decision shall be final and binding on all parties.

(b) The arbitrator shall have no authority to (1) add to, detract from or in any way modify the terms of this Agreement, or (2) hear more than one grievance at the same hearing, or (3) pass upon any question involving regular wage rate schedules with the exception of a new or changed jobs as defined in Article VII, Section 11, or (4) pass upon any question relating to benefits under the Retirement Plan, Life Insurance Plan, Medical Plan, Dental Assistance Plan, Sick Pay Plan, Savings Plan or Long Term Disability Plan.

(c) The Company and the Union shall each bear their own expenses and shall equally bear all compensation and expenses of the arbitrator.

(d) A stenographic record of the hearing shall be made of all testimony taken during the hearing. The initial copy of this record shall be made available to the arbitrator for his sole use.

The cost of the use of this initial copy and its own copy shall be borne by the Company, unless the Union also desires a copy. If the Union desires a copy, it shall notify the Company prior to the close of the hearing. The Company and the Union shall then equally share the cost of the Arbitrator's copy, and shall each bear the cost of any copies of the record they desire.

(e) If the Union, in submitting a grievance to arbitration, fails to meet any time deadline set forth in the foregoing arbitration procedure (unless the time is extended by mutual consent in writing), the grievance shall be deemed withdrawn.

May 13, 1981

H. E. Rhodes, Jr.
Labor Relations Supervisor
Appalachian Power Company
Box 2021
Roanoke, VA 24022

Dear Mr. Rhodes:

On April 8, 1981, the United States Court of Appeals for the Fourth Circuit issued its Judgment in forcing [sic] the Board's Decision and Order of September 28, 1979.

The Union hereby requests that the Company fully comply with the Board Order dated April 20, 1981, and accordingly reinstate the employee grievance-arbitration procedure for the unit employees and the five minute wash-up period for those unit maintenance employees who enjoyed such benefits before its rescission on March 3, 1978.

Please notify the Union, in writing, as to what steps the Company has undertaken to comply with the Board Order.

Very truly yours,

/s/ Judith C. Boyd
Staff Representative

TABLE 4—Mechanisms for Handling Complaints from Unorganized Employees

	% of Companies					
	By Industry			By Size		All Companies
Type of Mechanism Available	Mfg.	Nonmfg.	Nonbus.	Large	Small	
"Open door" program	82	54	19	56	52	54
Formal grievance procedure	22	41	78	50	39	44
Appeals official within company	6	18	19	16	11	6
Appeals official outside company	0	3	8	6	0	3
None	12	13	3	11	8	10